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Our recent comments, upon the decision of a Nebraska judge, construing the divorce law of that State, and holding in effect that a marriage outside of that State, not in accordance with its laws, or rather in derogation of the terms of its statutes, was illegal and void, were made upon the facts as reported to us. It was not asserted, nor made to appear, so far as we know, that the parties went from the State of Nebraska to another State for the purpose of avoiding the provisions of the prohibitory statute of the former State, and if such was the case, as a correspondent, whose letter appears in another column, informs us, it puts the matter in a very different light, as there is ample authority for the proposition that a marriage performed under such circumstances is, by reason of the fraud, and through the application of the law of comity, illegal and void.

The decision of Justice Brewer, in the recent case in the United States Circuit Court for Nebraska, wherein the Rock Island Railroad Company sought to enforce the specific performance of a contract made with the Union Pacific Railroad Company, for the joint use of certain tracks and bridges, is of value, more on account of the large interests involved, than by reason of any special novelty in the law laid down. One point, however, is worth noting, especially as, in its determination, the learned justice very neatly cited, as his authority, the decisions and rulings of Judge Dillon while upon the circuit bench, against the position taken by the same gentleman as attorney for the defendant in this proceeding. It was contended, among other things, on behalf of the defendant, that the contract was one of which a court of equity could not take cognizance and decree specific performance. As to this, Justice Brewer says:

> Is this contract one of which a court of equity may compel specific performance? Fortunately a recent decision of the supreme court in the case of Joy v. St. Louis, 138 U. S. 1, relieves me from embarrassment. That case was originally heard before me while I was circuit judge; and after a careful examination, and though in the face of seemingly adverse precedents, I decreed specific performance of a contract for the joint use of a track. That decree was affirmed by the unanimous opinion of the supreme court. All of the objections which are here made were presented then and overruled; and the necessity of the interposition of a court of equity in cases of this kind is clearly shown by Mr. Justice Blatchford, in the opinion of the court. The spirit of that decision is expressed in this quotation: "Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."
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> I know, to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed, the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years, seems a strange exercise of power; but I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations, and the protection of rights can demand. And in passing I may be permitted to observe that in this respect the distinguished jurist who appears for the defendants in this case taught me my first lesson; who, on the bench of the circuit court of this circuit not only took possession of and managed great railroad companies by receivers; built hundreds of miles of railroad and created millions of dollars of obligations against those roads. I then watched those proceedings with something of amazement, but the more I studied the more I admired, till having thus studied at the feet of Gamaliel, I learned to believe that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation, to protect every corporation from the destroying greed of the public; to stop State or nation from spoliating or destroying private rights; to grasp with strong hand every corporation and compel it to perform its contracts of every nature and do justice to every individual.

NOTES OF RECENT DECISIONS.

IMPUTED NEGLIGENCE — VOLUNTARY EXPOSURE TO SAVE LIFE.—The mooted question as to whether it is negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger, was decided in the negative by the Supreme Court of Ohio, in Pennsylvania Co. v. Langendorff, 28 N. E. Rep. 172. Bradbury, J., says:

> Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it;

therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. * * * If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. * * * If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort." Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the stand-point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even in some instances and in some States, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running, towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and to compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.

In Railway Co. v. Hiatt, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In Eckert v. Railway Co., 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. Linnehan v. Sampson, 126 Mass. 506; Donahoe v. Railway Co., 83 Mo. 560; Beach, Contrib. Neg. p. 45, § 15; Whart. Neg. § 314; Pierce, R. R. 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. Carroll v. Railroad Co., 14 Minn. 57, (Gil. 42); Pennsylvania Co. v. Roney, 89 Ind. 453; Cottrill v. Railway Co., 47 Wis. 634, 3 N. W. Rep. 376. We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

JURISDICTION UNDER JOINT DEBTOR ACTS.

Nearly all the States have acts, which are commonly known as joint debtor acts, under which, in actions against persons jointly bound, the court is authorized to give judgment against such as are served. Some of these acts also provide that the judgment may be rendered against all the defendants, but execution shall be levied only on joint property and the separate property of the defendants actually served. The object of the present paper is to investigate the general question: What is necessary to give the court jurisdiction in these cases?

It is well understood that at common law in a proceeding against joint debtors no judgment at all could be rendered until service was had upon all the defendants, or until those not served were prosecuted to outlawry. After judgment of outlawry had against the unserved defendants, the plaintiff was permitted to proceed against the defendants served. Process of outlawry could not be had till return of the original writ showing service as to those actually served and "not found" as to the others. The effect of the judgment then seems to have been substantially the same as if judgment had been rendered upon return of service as to all defendants. The process of outlawry was very formal and dilatory. It does not seem to be certain that it was ever used in America. At a very early day a statutory modification began which obviated the necessity of "process of outlawry." This seems to have been the beginning of joint debtor acts. The early forms of these acts permitted interlocutory judgments from time to time, and the issuing of "alias" process till all the defendants were served, and judgment had against all.

The more recent form of these acts is that permitting judgment against all defendants and providing that execution shall be levied only on the joint property and the property of those actually served. Some courts have held such statutes void, and others, while criticising them severely, have in the cases presented given greater or less effect to the act. It will be observed that the principle at the bottom of the common law procedure was that prohibiting the taking of private property without what is described as "due process of law." This principle is older than any written constitution, and has its origin in the fundamental rights of mankind, being a part and incident of the right of private property. It would seem, therefore, that the principle is equally applicable to the statutory substitute as to common law process of outlawry. Before the common law process was applicable, some return by the officer was necessary as to every defendant named in the writ. This was necessary to give the court jurisdiction to proceed to outlawry. It would seem that the same requirement is necessary to give the court jurisdiction to apply the statutory process of outlawry contained in the joint debtor act.

I have been able to find no discussion of the subject in either text-book or decision. Mr. Justice Bradley, in Hall v. Lanning, 91 U. S. 160, refers to the matter incidentally, but seems to take it for granted that a return of "not found" is a condition precedent of jurisdiction to apply the joint debtor act. It may be suggested that this is a question of procedure and not of principle. I do not think so. The question is not "What form of procedure is necessary to give the court jurisdiction," but, "Is not some formal procedure, of some sort, as to each defendant, necessary before the court can acquire jurisdiction whereby his rights can be affected, and this regardless of whether those rights are separate from or joined with the rights of others?"

The question does not so often arise in those States in which a partnership is a separate entity. In such cases the form of procedure is settled and sufficient because the partnership contract there makes each member of the firm agent of all the rest for service of process so far as social assets are concerned. The principle applies even in such States where the joint contract does not arise out of partnership transactions.

It is difficult to perceive any reason, or principle of application, of the rules requiring "due process of law," which do not to the full apply in the class of cases under consideration. It is possible that the legislature may have the power to provide that each joint contractor shall be agent for all the rest for service of process, but it is apprehended that the language will have to be clear before

such effect can be given to it. Such effect surely ought not to be by forced and unnecessary construction, and especially when such construction would, in some cases at least, practically nullify other statutory provisions, or well settled principles. Such construction would be at variance with every recognized rule of statutory construction. In order to give effect to the joint debtor act the court must judicially ascertain that some one or more defendants were served with process and others were not served. The law presumes that a defendant is not served until service appears affirmatively. This presumption is *against* jurisdiction and not in favor of it.

Jurisdiction Cannot be Acquired by Presumption.—In order that the court may have jurisdiction to give effect to the joint debtor act, it must either have a return showing affirmatively that the unserved defendants were in fact unserved, or else from the silence of the return as to these defendants the court must presume that they were unserved and adjudicate the fact upon that presumption. It would seem that the latter course cannot be maintained. If the court can presume that a defendant is unserved because no return is made as to him, and therefore enter up a judgment determining his rights and subjecting his property to execution, it is difficult to perceive why the court may not at once presume that he was served and do the same thing. The difference is one of degree and not of principle. In each case the court takes to itself a jurisdiction to pass on the rights of an individual with nothing upon the record to show that he is a party to the proceeding, or that any effort has been made to make him so, except that he has been named as a defendant.

I conclude, therefore, that some return as to each defendant is essential to the jurisdiction of the court to pass upon or affect the rights or property of unserved defendants under the joint debtor acts. But the joint debtor acts themselves constitute the sole authority for the entry of any judgment at all, except upon service as to all defendants. It follows, therefore, from the foregoing, that unless there is some return as to every defendant named in the process, the court has no jurisdiction to render any judgment whatsoever.

LANCELOT M. KEAN.

PUBLIC POLICY — CONTRACTS IN RESTRAINT OF TRADE—INJUNCTION.

STERNBERG V. O'BRIEN.

Court of Chancery of New Jersey, July 20, 1891.

1. Where defendant, who was a collector in the service of the complainant, stipulated in his contract that, during his employment and for one year after its termination, "he will not engage in or be concerned or interested in the installment clothing business in the city of Newark or Jersey City, on his own account, or as agent or employee of any other person or persons, in any capacity," the whole provision must be construed together, and will be held to mean that he would not take employment in that particular business, in any capacity, and the restriction therefore cannot be held invalid as general, but is partial and reasonable.

2. For breach of contract the ordinary and exclusive remedy is an action at law, and where defendant has violated a valid stipulation in a contract by accepting employment of other persons engaged in the same business, within a year after the termination of his service for complainant, he cannot be restrained by injunction from continuing in such new employment, in the absence of a showing of damages resulting therefrom which cannot be compensated by money.

3. It appeared that defendant's employment had been in the capacity of a collector in the installment clothing business; that his duty was to go to persons to whom garments had been sold and collect the installments from them as they became due; that he made no sales and in no way came into contact with complainant's customers except by making collections; that he was actually in complainant's service less than five weeks: *Held*, that these facts were insufficient to sustain an allegation of special injury: that the knowledge of, and acquaintance with, complainant's customers which defendant had obtained would place it in his power to influence many of them to buy their garments at the rival house where he was employed, and that the bill must be dismissed.

VAN FLEET, V. C.: The main question presented for decision in this case is whether or not the complainant is entitled to a decree restraining the defendant from violating his contract. The case is before the court on final hearing. The parties to the suit, on the 20th day of January, 1891, made a contract under seal, by which the complainant employed the defendant in the capacity of collector in the installment clothing business carried on by the complainant in Newark and Jersey City, at a weekly salary of $20, and agreed, in addition, to keep the defendant in his employ as a collector so long as the defendant performed his work honestly and faithfully and to the satisfaction of the complainant; and the defendant agreed, in consideration of such employment, that during its continuance, and for one year after he ceased to be employed by the complainant, whether he voluntarily abandoned such employment or was discharged therefrom, he would not engage in or be concerned or interested in the installment clothing business in the city of Newark or Jersey City, on his own account or as the agent or employee of any other

person, in any capacity. The defendant served the complainant under the contract from its date until the 23d day of February, 1891, a period of between four and five weeks, and then abandoned his service, and shortly afterwards accepted employment as collector from a person carrying on a rival business in Newark. It is undisputed that the defendant has, without cause, violated one of the most important provisions of his contract. Against the injury which is thus inflicted the complainant asks to be protected by injunction. He wants the defendant prohibited from being employed in any capacity in the installment clothing business, by any person carrying on that business, either in Newark or Jersey City, for the space of one year from the time defendant left his employ.

The relief asked is resisted on several grounds. The defendant says, first, that the contract in question is void because the restraint which it imposes upon him is unreasonable; in other words, that it is greater than is necessary for the protection of the complainant. The law is settled that a contract in restraint of labor, which seeks to prevent one of the contracting parties from exercising his skill or labor generally, without limitation as to place, or time, or which attempts to put a restraint upon his right to labor or to exercise his skill greater than is necessary for the fair protection of the other party to the contract is void. "Public policy," said Vice-Chancellor James, afterwards one of the lord justices of the court of appeal of England, in Leather Cloth Co v. Lorsont, L. R. 9 Eq. 345, 354, "require that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent by any contract that he enters into." "The law," said Best, C. J., in Homer v. Ashford, 3 Bing. 322, 326, "will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void, because no good reason can be imagined for any person imposing such a restraint on himself." "So far has this principle been carried," said Chief Justice Beasely, in Brewer v. Marshall, 19 N. J. Eq. 537, 547, "that even in cases in which the restraint sought to be imposed is only partial it has been repeatedly held that such agreement will be void, unless it be reasonable: and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other." The test which the law prescribes in all such cases is this: The restraint, in order to be valid, must be only such as is necessary to afford a fair protection to the party in favor of whom it is given, and not so large as to interfere with the interest of the public. This is the principle which controlled the decision in Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. Rep. 37, and must, I think, be adopted as the rule of decision in this case. The contract under consideration, it is insisted, violates this principle. It is said that, while the contract gives the defendant employment in only one capacity, or of but a single kind, it attempts to prohibit him, for a year after he has ceased to be employed by the complainant, from accepting, within the cities designated, and from a certain class of persons, employment of any kind whatever, though such employment if not in the installment clothing business, but entirely outside of it. Put in another form, the fault imputed to the contract is this: Though employed in a single capacity, in a particular business, the defendant cannot, for a year after he has ceased to be employed by the complainant, take employment as a coachman, waiter, or in any other capacity, from any person engaged in the installment clothing business, in either Newark or Jersey City, without committing a breach of his contract. To me its seems to be entirely plain that, if the contract is subject to the vice which is thus imputed to it, it must be held to be invalid. If it be true that it restrains the defendant from doing work which, though done for another person, carrying on the same business that the complainant carries on, can in no event and under no circumstances result in loss or injury to the complainant it is clear beyond dispute that the restraint which it imposes on the defendant is larger than the fair protection of the complainant requires. It is manifest that the restraint so far as it prevents the defendant from doing work for a rival of the complainant, outside of the installment clothing business, does the complainant no good—he derives no benefit from it; and that the only purpose its enforcement would serve would be to oppress the defendant. A contract of this class, which cannot be enforced without resulting in such consequences to one of the contracting parties, is, by the uniform course of decision on this subject, held to be unreasonable and void. Is this contract subject to the fault imputed to it? At the argument I thought it was, and so intimated, but subsequent examination and consideration has resulted in a conviction that it is not. The defendant does promise that he will not serve any rival of the complainant, carrying on business in Newark or Jersey City, "in any capacity;" but the broad meaning of these words is plainly limited by other words of the contract. The restraint which the defendant put upon himself is expressed in these words: That "he will not engage in, or be concerned or interested in, the installment clothing business in the city of Newark or Jersey City on his account, or as agent or employee of any other person or persons in any capacity." It thus appears that the defendant's promise is that he will not take employment in a particular business in any capacity. When, therefore, the whole of the restrictive clause is read, it is made entirely plain that the restraint which the defendant put upon himself is not general, but partial; and that the only thing which he has prevented himself from doing, after

he ceases to be an employee of the complainant, is engaging in, or being concerned or interested in, the installment clothing business. He cannot serve or assist a rival of the complainant in the prosecution of that particular business in any capacity, in either of the two cities named, but the interdiction is confined to that particular business. As to any other business or employment, he is unbound and free. Anything outside of the installment clothing business he is just as much at liberty to do for a rival of the complainant as though he had not made the contract in question.

The next ground on which relief is resisted is that the injury which the complainant has sustained by the defendant's violation of his contract not irreparable, but can be fully and effectually redressed by the damages which may be recovered in an action at law. The ordinary and usual judicial remedy for a breach of contract is an action at law; and in cases where that remedy will fully answer the purposes of justice, the law courts have exclusive jurisdiction, and courts of equity are entirely without jurisdiction. It is only in cases where the remedy at law will not fully answer the purposes of justice, but is plainly inadequate that a court of chancery may take jurisdiction and give relief. This is the only foundation on which the jurisdiction in equity in this class of cases rests, and it has no other. The rule laid down by Judge Baldwin on this subject, in Bonaparte v. Railroad Co., 1 Baldw. 205, 217, has been adopted generally, if not universally, as the true one. In speaking of the manner in which a court of equity should proceed in deciding whether or not a proper case exists for the exercise of its prohibitory power, he said: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless in cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages." This is one of the three rules regulating the granting of injunctions, which were declared in Citizens' Coach Co. v. Camden, etc., R. Co., 29 N. J. Eq. 299, 302, to be of such paramount importance that the court should constantly keep them in mind, and never disregard them. Though this rule was laid down by Judge Baldwin in deciding an application for a preliminary injunction, still there can be no doubt, in view of the principle on which the jurisdiction in equity rests in such cases, that his statement of the rule, so far as it limits the jurisdiction of courts of equity to cases of great injury, where the remedy at law is plainly inadequate to do full and complete justice, must be accepted as a correct exposition of the law, no matter at what stage of a cause—whether at the beginning or at the end—relief by injunction may be asked. And his caution against granting the writ in a doubtful case, where it can give but a slight protection to one party, and may inflict an irreparable injury upon the other, applies with just as much force where the application for the writ is made on final hearing as it does to an application made at the commencement of the suit. No matter when the writ is applied for, to warrant its issue, in a case like the one now under consideration, three things must be clearly shown: First that a valid contract has been violated in a material point; second, that such violation has resulted or will result in serious injury; and, third, that the remedy at law is plainly inadequate to do full and complete justice. A court of equity, in exercising its prohibitory power, must always proceed with the utmost caution, and see to it that its power is not so exercised as to do more harm than good. The power exists to prevent irreparable wrong, and should not, therefore, be used in any case when its use will produce the very result it was designed to prevent. The rule is fundamental that an injunction should never be granted when it will operate oppressively or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or when the benefit it will do the complainant is slight in comparison with the injury it will do the defendant. The great office of the writ is to protect and preserve, not to destroy.

Testing the complainant's right to an injunction by the principles above stated, I think it is clear that this court cannot grant him what he asks without transcending its jurisdiction. He wants the court to restrain the defendant from working at a particular employment in two of the largest cities of the State. To many persons the right to labor is the most important and valuable right they possess. It is their fortune; constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right, or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice. The defendant, it is true, has broken his contract, but that fact, standing alone, presents no ground whatever for the interference of this court; indeed scarcely more than would be presented by a case where the ground of action was a breach of warranty made on the sale of a horse. For a breach of contract the ordinary and exclusive remedy is an action at law, unless it is made clearly to appear that the damages resulting from it cannot be adequately compensated in money. In my judgment, nothing of that kind appears in this case. It is neither averred nor proved that the defendant, while in the complainant's employ under the contract in question, occupied a position of special confidence towards the complainant, and thus acquired a knowledge

of his business secrets and methods, which he may now use so as to benefit a rival and seriously injure the complainant. The defendant's contract required him to serve the complainant in carrying on the installment clothing business. That business, the proofs show, is conducted in this way: Garments are delivered to purchasers under contracts that the price agreed upon shall be paid in installments at short intervals—weekly or other short periods—and that the title to the garments shall remain in the vendor until all the installments have been paid. The defendant was employed as a collector. That is the employment specified in his contract. He was to go to the persons to whom garments had been sold, and collect the installments as they became due. He was not employed as a salesman. He made no sales. Nor was he required to render the complainant any service except to make collections from his customers. So that the only way he was brought in contact with the complainant's customers was in going to them to collect money from them. The bill alleges but a single ground of special injury, and that is this: That the knowledge which the defendant obtained of the complainant's customers while he was in the complainant's employ, and the acquaintance he then made with them, has placed him in a position where he may exercise a strong influence over them in controlling their trade, and has put it in his power, by the exercise of such influence, to induce many of them to buy their garments hereafter of the rival house where he is employed and not of the complainant. But is this averment true? It has not been proved. There is not a word of evidence going to show that the defendant possesses the slightest influence over a single one of the complainant's customers. His intercourse with them was of a kind which was much more likely to excite dislike and create antagonism than to inspire confidence or to give him popularity. His duty required him to be stern and exacting, to turn a deaf ear to all appeals for delay, and to insist that they should pay, whether it was easy or convenient for them to do so or not. A faithful discharge of his duty, necessarily, from the very nature of his employment, placed him in a position of hostility towards the complainant's customers; so that the presumption must be, in the absence of proof to the contrary, that his intercourse with them did not result in his acquiring sufficient influence over them to enable him to exercise any appreciable control over their trade. His intercourse with them, even if he possessed unusual tact, was much more likely, as is obvious, to create feelings of dislike on their part than friendship, and to make him unpopular rather than popular.

But there is another fact which, in my judgment, is decisive against the complainant's claim that the damages he will sustain by defendant's breach of his contract cannot be adequately compensated in money. The defendant's period of service under the contract was less than five weeks. He served the complainant under the contract just twenty-seven secular days. This time was entirely too short, and his intercourse with the complainant's customers much too slight and infrequent, to enable him, even if it be conceded that he possessed unusual magnetic power, to acquire much influence over them; certainly not enough to put it in his power to do the complainant any very serious injury. He probably did not, during this period, have more than four interviews with any one of them; and, when the object of his visits to them is remembered, it seems to me to be perfectly certain that the allegation that the defendant when he left the complainant possessed sufficient influence over them to do the complainant irreparable harm, by diverting their trade from him, is a pure fancy, having no foundation in fact. If it is possible for any damages to result to the complainant from this cause, it seems to me to be entirely clear that they must be very insignificant in amount. The case, as I view it, is completely devoid of a single fact or circumstance tending to show irreparable damage. The money value of the loss which the complainant has sustained or can sustain by the defendant's breach of his contract can be computed according to well-settled legal rules, with almost perfect exactness. When that is the case, the injured party has no right to a remedy in equity, and this court no power to give redress. This conclusion makes it unnecessary to consider the other grounds of defense. The complainant's bill must be dismissed, with costs.

NOTE.—The cases upon the subject of contracts in restraint of trade are an excellent illustration of the elasticity of the common law and the readiness with which it adapts itself to the changes in the state of society wrought by time and the development of trade and commerce. Originally all stipulations in restraint of trade were held to avoid the contract. Y. B. fol. 5, 2 Henry V, p. 26. Later, in the leading case of Mitchell v. Reynolds, 1 P. Wms. 181, s. c. Smith Lead. Cas. vol. I, pt. II. p. 756, it is laid down that, though "all restraints of trade which the law so much favors, if nothing more appear, are bad," yet "wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz: where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party and only oppressive." This ruling is the foundation of the doctrine of the courts as held to-day, though it has been extended and in many respects considerably modified.

Bearing in mind this process of change and development in the rule, it will be interesting to examine some of its most recent applications. As the general result of the cases it may be stated that both public welfare and the reasonableness of the restraint must be considered. If no question of public welfare is involved and the restraint upon the one party is not greater than protection to the other requires, the contract may be sustained. Gibbs v. Consolidated Gas

Co., 130 U. S. 396, citing Rousillon v. Rousillon, 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Oregon Steam Nav. Co. v. Winser, 20 Wall. 64. See also Diamond Match Co. v. Roeber, 106 N. Y. 473; Nat. Ben. Co. v. Union Hospital Co., 47 N. W. Rep. 806; Keith v. Hirchberg Optical Co., 2 S. W. Rep. 777; Sutton v. Head, 5 S. W. Rep. 410. Thus the limitation of space in a contract to "withdraw from the ice business in Greenfield" saves it from being in illegal restraint of trade. Handforth v. Jackson, 22 N. E. Rep. 634. See, also, Washburn v. Dorsch, 32 N. W. Rep. 551. A contract giving a particular person exclusive control of a brand of cigars within the limits of the State and agreeing that defendants would not sell them to any one else in that territory, is limited both as to time and place and is not invalid. Newell v. Meyendorff, 23 Pac. Rep. 333. And where one, whose only business was selling sand from land which he owned, having refused to sell a piece of it on the ground that it would hurt his business, finally agreed to sell on the vendee's stipulation not to sell sand from it, it was held that such a contract was valid. Hodge v. Sloan, 17 N. E. Rep. 335. See also, Morris v. Tuscaloosa M'f'g Co., 3 South. Rep. 689. It is not always essential that the limitation of the restriction should be expressed in the language of the agreement. Courts will look to the circumstances surrounding the parties, and attendant upon the transaction, and from a consideration of these, in connection with the expressions in the undertaking itself, they will first construe the contract, and then proceed to pass upon its reasonableness as thus construed. Where a firm engaged in the hardware trade, in selling out their stock of plow-blades and plow stock to a rival company agreed "not to handle any more plow-blades or plow stock," this language was construed, in connection with the evidence showing the extent of country over which the rivalry in business extended, not to be unreasonable or in restraint of trade. Moore v. Handley H. Co. v. Towers H. Co., 87 Ala. 206, 6 South. Rep. 41.

Even a limited restriction will be held unreasonable and render the contract invalid, if it is greater than the protection of the interest to be preserved requires. Thus, though a contract by defendant not to teach the French or German language in the State of Rhode Island for a year after leaving plaintiff's employment will not be held void or against public policy simply because it applies to the entire State, yet, if it appears that complainant offers to allow defendant to teach at a place in the State other than that at which plaintiff's school is established, but does not aver that such teaching would injure him, the fact that the contract applies to the entire State renders it unreasonable. Herreshoff v. Bontineau, 19 Atl. Rep. 712.

But there are certain cases in which a restriction has been held valid, though general both as to time and place. For instance, where such a restriction is essential to enable a party to enjoy unmolested the interest or privilege which he has bought. Thus it is said, in Diamond Match Co. v. Roeber, 106 N. Y. 473: "When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man should be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain? If his business extends over a continent, does public policy forbid his accompanying a sale with a stipulation for restraint, co-extensive with the business he sells? If such a contract is permitted is the seller any more likely to become a burden on the public, than a man who having built up a local trade only, sells it, binding himself not to carry it on in the locality? * * * To the extent that the contract prevents the vendor from carrying on the particular trade it deprives the community of any benefit it derives from his entering into competition. But the business is open to all others and there is little danger that the public will suffer harm from the lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege." Citing Whitaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Rousillon v. Rousillon, L. R., 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L. R., 9 Eq. 345; Morse Twist Dill Co. v. Morse, 103 Mass. 73; Printing, etc. Co. v. Samson, L. R., 19 Eq. 462. See also, Ainsworth v. Bentley, 14 Weekly R. 630; Stiff v. Cassell, 2 Jur. (N. S.) 348; Ingram v. Stiff, 5 Jur. (N. S.) 947; Hodge v. Sloan, 107 N. Y. 248; Leslie v. Lorillard, 110 N. Y. 533. In the recent case of Watertown Thermometer Co. v. Pool, 4 N. Y. Supp. 861, 51 Hun, 157, where the above language was quoted with approval, it was held that upon a sale of a controlling number of shares of stock in plaintiff corporation, an accompanying undertaking not to engage in the manufacture of thermometers or storm glasses, at any place within the United States at any time within the period of ten years was reasonable and necessary for the protection of the interest conveyed. And a contract between a manufacturing corporation whose business extends throughout the United States and Canada, and one of its traveling salesmen, who has been in its employ for several years whereby he agrees not to enter the service of any business competitor of the corporation for three years after leaving its service is valid. Carter v. Olling, 43 Fed. Rep. 208. But where defendant, a barber, who had no shop of his own, good-will, or patronage that could be conveyed, was going about the town and country barbering, and plaintiff agreed to furnish a shop and pay all the current expenses of the same, the gross receipts to be equally divided between them, it was held to be in no sense a sale of the good-will of a business and that defendant's stipulation, not to do any work then or thereafter outside of such shop or to hire to any party or parties, or open a shop of any kind to carry on the barber business either directly or indirectly within that town without any limitation as to time, must be deemed invalid as an unreasonable restraint of his liberty to profitably employ his services. Carroll v. Giles, 30 S. Car. 412, 9 S. E. Rep. 422.

If however, the purpose and effect of the agreement be to create a monopoly, the courts have no hesitation in declaring the obnoxious provisions void. Thus where the contract, between plaintiffs and defendants who were each manufacturers of lumber, provided that defendants were to make and deliver to plaintiffs during the year 1881 two million feet of lumber, at eleven dollars per thousand feet, and they further agreed not to manufacture any lumber during such period for sale within a specified territory, except under the contract, and to pay plaintiff twenty dollars per thousand feet for any lumber manufactured and sold to parties other than the plaintiff, and there were similar contracts made by plaintiff with other lumber dealers, the object of all of which was to form a combination among all the manufacturers of lumber, at or near that point, for the sole purpose of increasing the price

of lumber, limiting the amount thereof to be manufactured and to give the plaintiff control of all the lumber manufactured, the court held the contract void as an illegal combination, and against public policy. Santa Clara, M. & L. Co. v. Hayes, 76 Cal. 387. See, also, Pittsburg Carbon Co., Limited, v. McMillin, 23 N. E. Rep. 530, 119 N. Y. 46, 24 Abb. N. C. 96, where it is assumed that a contract, by several manufacturers of carbon for electric lights, with a third party whereby they made him trustee, and vested in him the management and control of their business, leasing their factories to him and agreeing to operate them under his direction, leaving it to him to designate the kind of goods to be manufactured and to fix the prices at which, and the persons to whom, they should be sold, was illegal, as creating a monopoly in restraint of trade. So where a domestic firm engaged in the manufacture and sale of woodenware sold its stock, materials, tools and machinery to a foreign corporation, and agreed not to manufacture or sell woodenware in eight named States during a period of five years, or permit its property to be used for that purpose during the time limited, but did not sell its real estate and agreed to take the machinery down and place it on board the cars, and it appeared that the business was to be no longer conducted in the State, it was held that the restriction was void as against public policy. Western Woodenware Assn. v. Starkey, 47 N. W. Rep. 604. And where all the grocers of a town agreed with a firm which was about to open a butter store that they would not buy or take in trade any butter for the term of two years; but the butter firm paid nothing to the grocers and bought out no established business, it was held that the contract was void as in restraint of trade. Chaplin v. Brown, 48 N. W. Rep. 1074. And see Ford v. Gregson, 14 Pac. Rep. 659, where a contract tending to establish a monopoly of water rights in a certain stream was held void on analogous grounds. And in an agreement, between the owners of rival steamboats on the Kentucky River, that in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expenses, and that if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, a further provision that the parties so selling should not enter the trade again within one year was held to be void. Anderson v. Jett, 12 S. W. Rep. 670 .This decision hardly seems to accord with the expressions quoted above from Diamond Match Co. v. Roeber, 106 N. Y. 473. There would, however, seem to be manifest reasons why the rule against the establishment of monopolies should be more rigidly enforced in considering contracts affecting public agencies like common carriers, than when dealing with the transactions of individuals who hold no franchise from the public, and are charged with no corresponding duties.

But, if the monopoly is one the validity of which is recognized by the law, as a patent right, secret process of manufacture, etc., a contract which fosters and protects it, will not be held invalid on that ground. One of the peculiarities of a patent for an invention is that it permits the establishment of a monopoly. The owner does not possess it even upon condition that he shall make or vend the patented article, or allow others to do so for a fair and reasonable compensation. He may suppress it altogether. An agreement by a patentee to allow an association and its members the sole use and sale of his invention upon the payment of a certain royalty is not void as in restraint of trade, although the association and the members do not bind themselves to use or sell the machinery at all. Good v. Tucker & Carter Cordage Co., 24 N. E. Rep. 15. See, also, Bowling v. Taylor, 40 Fed. Rep. 404. But on the other hand, a covenant in a contract for the sale of a patent right on the part of the vendor not to "manufacture, sell or cause to be sold, any sand-papering machines of any description," cannot be said to be in any sense incidental to the sale of the patent, or necessary as a just and lawful protection of the business of manufacturing and selling thereunder, and was held void as against public policy, although it affected only a single class of machines. Berlin Machine Works v. Perry, 38 N. W. Rep. 82. In Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. Rep. 658, a contract which communicates in confidence the ingredients of a certain proprietary medicine and a full and true copy of the receipt for preparing the same and provides in substance that each party shall enjoy a monopoly of the sale of it within certain defined parts of the United States was held to be neither unreasonable nor in restraint of trade. See, also, Tode v. Gross, 4 N. Y. Supp. 402.

The result of the cases seems to be this: That while the law will not lend its aid by sustaining the validity of a contract, the purpose, object and tendency of which is to create a monopoly, yet where the subject-matter of the contract is a monopoly, which the law recognizes, such as a patent right or a secret process of manufacture it cannot be held invalid as tending to establish a monopoly by the restraint of trade. And moreover where a party by his enterprise and energy has succeeded in extending his trade until he has a practical monopoly a stipulation in the contract by which he disposes of it, protecting his purchaser from his competition will not be deemed within the rule.

WM. L. MURFREE, JR.

CORRESPONDENCE.

NEBRASKA DIVORCE LAW.

To the Editor of the Central Law Journal:

In a recent issue of the CENTRAL LAW JOURNAL (vol. 33, p. 161), is an article criticising "a decision rendered by a Nebraska judge." I think the decision referred to was rendered by one of the judges of the district court in this county. I was not interested in the case, in any way; but if I understand the case, the decision is not without precedent. It was alleged and proven, as I am informed, that parties went from Nebraska to Missouri and married, for the purpose of avoiding the provision of our statute prohibiting marriage within six months after divorce. The article referred to says: "In other words, though legally man and wife in Missouri, yet the minute they crossed the line and came to Nebraska they were no longer, in legal contemplation, man and wife. The effect of this is to declare that every marriage in the United States not in strict accordance with the forms of the Nebraska statutes would be illegal in that State, all of which is absurd." I think the decision referred to is sustained by a precedent of the Tennessee Supreme Court. See Pennegar v. State, 28 Cent. L. J. 380, 10 S. W. Rep. 305, citing State v. Kennedy, 76 N. C. 251; Kinney v. Com., 30 Gratt. 858; Scott v. State, 39 Ga. 321; Dupre v. Boulard, 10 La. Ann. 411; Williams v. Oates, 5 Ired. 535.

J. B. STRODE.

Lincoln, Neb.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Rights of Widow—Dower.—Under Code Ala. 1886, § 1900, providing that the widow may retain possession of the dwelling-house where her husband most usually resided next before his death, until her dower is assigned, free from rent, the fact that the wife is insane at the time of her husband's death, and is shortly thereafter removed to an insane hospital, does not deprive her of her quarantine rights, and she may bring ejectment against a purchaser in possession.—*Clancy v. Stephens*, Ala., 9 South. Rep. 522.

2. ADMINISTRATORS — Funeral Expenses. — The rule that an executor, if he have sufficient assets, is liable to an undertaker who, at the request of those in charge of the remains of a deceased person, rendered services in and about the interment, is the same in the case of an administrator.—*Dampier v. St. Paul Trust Co.*, Minn., 49 N. W. Rep. 286.

3. ADMINISTRATORS—Sale.—In case a public administrator obtains an order of court to sell property of a vacant estate, and, under regular proceedings thereafter, the same is sent to sale, and adjudicated for a price actually and really paid, he cannot be proceeded against as a *negotiorum gestor* by persons claiming an interest in said succession and property, on averment that such sale was the result of a fraudulent conspiracy on the part of others, in which said public administrator did not participate.—*Gole v. O'Connor*, La., 9 South. Rep. 557.

4. ADMIRALTY—Sale — Distribution.—Where a vessel has been attached and sold as perishable, and the resulting fund paid into court for distribution, a libel for a debt acknowledged to exist, the lien of which was discharged by the sale, will not be dismissed even if the debt was not due at the time of suit brought.—*The Papa*, U. S. D. C. (Penn.), 46 Fed. Rep. 574.

5. ADVERSE POSSESSION—Color of Title.—One who enters on land under color of title by deed has "actual possession" to the extent of the boundaries therein described, though the title be otherwise defective.—*Black v. Tennessee Coal, Iron & R. R. Co.*, Ala., 9 South. Rep. 537.

6. ADVERSE POSSESSION—Color of Title.—Where, in ejectment against a railroad company, the defendant claims by adverse possession under color of title, consisting of defective condemnation proceedings, actual possession of a part of the tract is to be regarded as actual possession of the entire tract described in the condemnation proceedings; and this, though plaintiff was not paid for the land, and had no notice of the proceedings.—*Cogsbill v. Mobile & G. R. Co.*, Ala., 9 South. Rep. 512.

7. ARBITRATORS—Compensation.—It is no defense to an action by one for services rendered as an arbitrator, against the person who chose him, that by the terms of the submission the expenses were to be shared by the parties to the controversy, but this is only matter in abatement.—*Alexander v. Collins*, Ind., 28 N. E. Rep. 190.

8. ASSIGNMENT—Trust.—The owner of a note, who had brought suit on it against the maker, assigned the note, together with all the avails of the suit, to a trustee for the purpose of securing certain persons who had become sureties for him upon a bond, "first deducting and paying out of any money that may be realized all charges for costs and attorney's fees:" *Held*, that such assignment created a trust in favor of the assignor's attorney for his fees and disbursements for costs in the suit on the note.—*Tyler v. Mayre*, Cal., 27 Pac. Rep. 160.

9. BOUNDARIES.—Where adjacent owners are in doubt as to the boundary, and after a survey agree upon a certain line, their agreement is valid, and the line as established by it will be held to be the true one.—*Levy v. Maddux*, Tex., 16 S. W. Rep. 877.

10. CARRIERS — Passengers— Street Railways—Negligence.—While in an action against a street railway company for injuries which the complaint alleges were due to the willful acts of defendant's servants, proof of simple negligence is not sufficient, where the evidence is open to the interpretation that the servants' acts were willful, the question is for the jury, and an instruction that there was a fatal variance between allegations and proof is properly refused.—*Highland Ave. & B. R. Co. v. Winn*, Ala., 9 South. Rep. 509.

11. CHATTEL MORTGAGES—Fraudulent Conveyances.—A chattel mortgage by a firm to one of the members thereof, as nominal mortgagee, to secure a note executed by the members of the firm to a bank, representing a *bona fide* indebtedness, in which the note is copied, and it is expressly stated therein that the mortgage is given to secure the payment of said note to said bank: *Held*, that the security is given by the firm to the bank.—*First Nat. Bank v. Ridenour*, Kan., 27 Pac. Rep. 150.

12. CHATTEL MORTGAGES—Lien.—Where a mortgagee obtains possession of the mortgaged chattels before any lien or other right attaches his title under the mortgage is good against everybody if it was previously valid between the original parties to the mortgage. The purchaser of a note secured by a subsequent mortgage upon the same property taken by the mortgagee, with notice of the prior mortgage, is bound to take notice of the possession of the first mortgagee, acquired previous to such purchase.—*Gagnon v. Brown*, Kan., 27 Pac. Rep. 104.

13. CHATTEL MORTGAGES— Recording. — Under Code Ala. § 1806, it is not necessary to record the mortgage in the county to which the property is removed until six months after its removal; and one who purchases before the expiration of the six months gets no title as against the mortgagee, though he keep it for no more than six months, and the mortgage is never recorded.—*Malone v. Bedsole*, Ala., 9 South. Rep. 520.

14. CONSTITUTIONAL LAW.—Under Const. Mo. art. 10, § 12, providing that "no county shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such a year," a county warrant issued in payment for county books bought by the county clerk, which he is required to provide by Rev. St. Mo. § 623, is void if, at the time of its issuance, the revenue for that year is already consumed.—*Geo. D. Barnard & Co. v. Knox County*, Mo., 16 S. W. Rep. 917.

15. CONSTITUTIONAL LAW—Citizens—Aliens.—The statute which provides that the widow shall not be entitled to an interest in lands conveyed by the husband when the wife, at the time of the conveyance, was a non-

resident of the State, is not repugnant to section 2 of article 4, or the fourteenth amendment to the constitution of the United States.—*Buffington v. Grosvenor*, Kan., 27 Pac. Rep. 137.

16. CONSTITUTIONAL LAW—Physicians—Druggists.—It is no infringement of the vested rights of physicians that the law prohibits them, without compliance with its requirements, from keeping "open shops for the retailing, disbursing, or compounding of medicine and poisons," though they may be fully competent to do so.—*People v. Moorman*, Mich., 49 N. W. Rep. 263.

17. CONSTITUTIONAL LAW—Private Corporation.—Act Ind. March 4, 1891, abolishing the State board of agriculture, and transferring all its property to another institution, is unconstitutional, since said State board, though organized under Act Feb. 14, 1851, for the public benefit, is a private corporation.—*Downing v. Indiana State Board*, Ind., 28 N. E. Rep. 123.

18. CONTEMPT—Jury Trial.—A party charged with contempt for the violation of an injunction is not of right entitled to a jury trial.—*State v. Durein*, Kan., 27 Pac. Rep. 148.

19. CONTRACT—Consideration.—When heirs who do not know to whom insurance policies are made payable enter into a mutual agreement providing that an administrator shall be appointed, who shall receive all moneys from insurance societies, and pay all debts, etc., and the residue to be shared equally among them, regardless as to whom the insurance might be made payable, the mutuality of the contract is a sufficient consideration therefor as to the one to whom the insurance was made payable.—*Supreme Assembly v. Campbell*, R. I., 22 Atl. Rep. 307.

20. CONTRACT—Damages.—In an action to recover damages for breach of a building contract in failing to make certain payments, the fact that defendant, before the work was commenced, notified plaintiff not to proceed therewith, as an ordinance had been passed opening a street through the ground that the houses were to occupy, will defeat recovery for a bonus earned under the contract by subsequently carrying the work to a certain stage, but not for general damages for breach of the contract.—*Heaver v. Lanahan*, Md., 22 Atl. Rep. 268.

21. CONTRACT—Evidence.—Where, in an action to recover for fertilizer delivered, the defense is that it was delivered in part payment for the debt of another, upon a contract entered into between the parties, it is proper to admit evidence that defendant sent a message to plaintiffs requesting them to deliver the fertilizer according to the understanding between them, although the messenger did not know the terms of the understanding.—*Webster v. Le Compte*, Md., 22 Atl. Rep. 232.

22. CONTRACT—Gambling Contract—Promissory Notes.—Pen. Code Cal. § 330, declares "any banking game played with cards, dice, or device for money" an offense punishable by fine, and Civil Code, § 1667, declares any contract contrary to the policy of express law, or "contrary to good morals," to be unlawful: *Held*, that notes given for a debt created by throwing dice are invalid between the original parties or purchasers with notice.—*Shain v. Goodwin*, U. S. C. C. (Cal.), 46 Fed. Rep. 564.

23. CONTRACT—Interpretation.—Where a creditor holding a policy on the life of his debtor contracts with the debtor's widow to pay her part of the policy when collected, in consideration "that she is to do all within her power in aid of the collection of the policy," the widow cannot recover the amount agreed to be paid her, if, after making the contract, she voluntarily makes affidavit that, at the time the creditor took out the policy on her husband's life, the debt was much less than the policy, as such affidavit does not aid, but retards, the collection of the policy.—*Alexander v. Sanders*, Ala., 9 South. Rep. 521.

24. CONTRACT—Monopolies.—Where a contract for the sale of grain bags provides that the vendee shall have the exclusive sale of the same to the amount of 187,500, and the vendor agreed not to sell or offer the same for sale to any other person, and if the vendee failed to sell the full amount, the vendor agreed to accept the sale of a *pro rata* amount, and such contract is a part of a scheme to gain a monopoly, it is void, as against public policy, and there can be no recovery for a breach thereof.—*Pacific Factor Co. v. Adler*, Cal., 27 Pac. Rep. 36.

25. CONTRACT—Parol Evidence.—Where a contract for the construction of a house stipulates that the work shall be done according to the attached plans and specifications, and a dispute arises as to how part of the work should be done, the builder may put in evidence a plan not attached to the contract, but which was exhibited to him at the time he made the contract, as explaining how the work should be done about which the dispute subsequently arose.—*Myer v. Fruin*, Tex., 16 S. W. Rep. 868.

26. CONTRACT TO CONVEY DECEASED WIFE'S LAND.—A contract by the husband to convey his deceased wife's land, "as soon as administration is had upon said estate," is void, as being against public policy, since the husband can neither bind the estate nor the course of administration.—*Specht v. Collins*, Tex., 16 S. W. Rep. 934.

27. CORPORATION—Corporate Seal.—A formal resolution of the directors of a corporation, authorizing a sealed contract, is unnecessary, and parol evidence is admissible to show that the corporate seal was affixed thereto in the presence and by the authority of the full board and was signed by all the stockholders, and by two directors on behalf of the corporation.—*Zihlman v. Cumberland Glass Co.*, Md., 22 Atl. Rep. 271.

28. CORPORATION—Dividends.—The directors of a hydraulic mining corporation, which became indebted by acquiring incumbered property, and making improvements on the mine, are not liable to the corporation under Civil Code Cal. § 309, for dividends declared and paid out of the net profits of the mine before paying the whole of such debt, when a sinking fund has been provided, sufficient to extinguish the debt before the mine shall be exhausted.—*Excelsior Water & Min. Co. v. Pierce*, Cal., 27 Pac. Rep. 44.

29. CORPORATION—Real Party in Interest.—The trustees of a corporation *de facto* can sue in its corporate name until its existence is questioned by a direct proceeding on information of the attorney general.—*First Baptist Church v. Branham*, Cal., 27 Pac. Rep. 60.

30. CORPORATION—Stockholders.—Under Civil Code Cal. § 5322, where one stockholder and director pays more than his proportionate share of such debt, the payment is not voluntary, and he is entitled, as against a co director who knew of and acquiesced in such payment, to contribution, and to be subrogated to the rights of the creditor, since he has a beneficial interest in the property of the corporation, which is answerable for the debt, and from which the other stockholders' proportion must be paid, if not paid by them individually.—*Redington v. Cornwell*, Cal., 27 Pac. Rep. 46.

31. CREDITORS' BILL—Receivers.—Where a creditors' bill sets out that defendant has conveyed his property to his wife for a fictitious consideration; that their debts accrued prior to the conveyance; that the debtor has no other property with which to satisfy their demands; and prays the appointment of a receiver for the stock of goods conveyed; and the evidence shows that the debtor is insolvent; that the goods will be wasted or disposed of so that they will not be forthcoming to satisfy a decree in plaintiff's favor, it is proper for the chancellor to appoint a receiver.—*Heard v. Murray*, Ala., 9 South. Rep. 514.

32. CRIMINAL LAW—Burglary—Possession.—Defendant's exclusive possession of property which has been recently stolen by burglars is presumptive evidence of his being guilty of both burglary and larceny, but his possession jointly with another person is no proof of his guilt.—*State v. Wurford*, Mo., 16 S. W. Rep. 886.

33. CRIMINAL LAW—Instructions.—Under Rev. St. Mo 1879, § 1920, which forbids judges to comment on the evidence in criminal cases, it is error to instruct the

jury that defendant's attempts to escape from custody and to procure false testimony are, if proved, circumstances to be considered in determining his guilt or innocence.—*State v. Sivils*, Mo., 16 S. W. Rep. 880.

34. CRIMINAL LAW—Obstructing Officer.—An information in a criminal prosecution which charges the defendant substantially in the language of the statute and in detail with knowingly and willfully obstructing, resisting, and opposing the sheriff in selling certain personal property on execution in a civil action, is sufficient although it may state other matters not necessary to be stated.—*State v. Morrisson*, Kan., 27 Pac. Rep. 133.

35. CRIMINAL LAW—Receiving Stolen Goods—Satisfaction.—How. St. Mich. § 9143, provides that on a first conviction of any person of receiving stolen goods, when the act of stealing them was a simple larceny, if the receiver shall make satisfaction to the party injured, to the full value of the property stolen and not restored, he shall not be imprisoned in the State prison. *Held*, that it is not a sufficient satisfaction that the receiver loaned to the thief, on ample security, money to reimburse the owner.—*People v. Hubbard*, Mich., 49 N. W. Rep. 265.

36. CRIMINAL PRACTICE—New Offense in Indictment.—Where the complaint and warrant charge a defendant with the larceny of United States currency and United States coins, and the defendant, upon arrest, waives a preliminary examination thereon before the examining magistrate, the county attorney, in filing the information against the defendant, cannot add a new offense that is, he cannot charge the defendant with the larceny of a pocket-book or a promissory note, neither of which are mentioned, referred to, or by any implication whatever charged, in the original complaint or warrant, when the preliminary examination was waived.—*State v. Jarrett*, Kan., 27 Pac. Rep. 146.

37. CRIMINAL TRIAL—Jury.—Under Rev. St. Mo. 1889, § 3244, providing that, where the sheriff is interested or prejudiced, the court may appoint one or more persons to perform his duties, the fact of the sheriff's interest or prejudice may be ascertained by the court from *ex parte* affidavits, and it is no abuse of discretion to remove the sheriff, and appoint elisors to summon the *venire* and perform the other duties of the sheriff in a murder trial, when the prosecuting attorney makes affidavit that the sheriff and coroner are prejudiced in favor of defendant.—*State v. Hultz*, Mo., 16 S. W. Rep. 940.

38. CROSSING.—Where a boy of 13 years, familiar with a railroad crossing at which, on account of a deep cut, a train could not be seen until one was on the track, drives upon it with his ears covered up on account of cold, though he had just been told at the post office that the train was late, and would probably reach the crossing at about the same time he did, he is guilty of contributory negligence which will prevent recovery for his death, though the train was running at a high rate of speed, and the whistle was not blown.—*Norfolk & W. R. Co. v. Stone's Adm'r*, Va., 13 S. E. Rep. 432.

39. DEATH BY WRONGFUL ACT—Emancipation.—In an action against a railroad company for the death of a minor, an averment in the complaint that deceased was not, and for two months before his death had not been, in the service of his parents, is not sufficient to show emancipation of the minor.—*Berry v. Louisville, E. & St. L. R. Co.*, Ind., 28 N. E. Rep. 182.

40. EASEMENTS—Extinguishment.—Where the deed granting one coroner of a tract grants also a right of way for the length of one side of the lot between it and the next lot for the benefit of both, and the owner of the first lot afterwards acquires both, the easement is extinguished, and the owner of the balance of the tract, which is not contiguous to such way, has no right to require the way to be kept open.—*Capron v. Greenway*, Md., 22 Atl. Rep. 269.

41. EJECTMENT — Title.—One claiming under a deed from a woman who inherited from a former husband may maintain ejectment with out showing that she had no children by him living at the time she executed the deed. If defendant claims that such children were living, the burden is on him to show it.—*Grigsby v. Akin*, Ind., 28 N. E. Rep. 180.

42. EMINENT DOMAIN—Acquiring Easement.—Where a city takes land for the purpose of making a new channel for a brook, reserving to the owners "the right to erect and maintain buildings over and upon said brook, and to use the waters of said brook," and states in the proceeding that it is "the intention of this taking to acquire merely the right to improve the channel," the city only acquires an easement, though the act under which the land is taken contains a provision that "the title to all lands so taken shall vest in said city."—*Conklin v. Old Colony R. Co.*, Mass., 28 N. E. Rep. 143.

43. EMINENT DOMAIN—Compensation.—The owner of the soil of a highway, taken by a railroad company for its roadway, under an agreement between the company and the commissioners of the county as to the terms and manner of its use, as provided in section 3283, Rev. St., is entitled to compensation for its appropriation, and may compel the company, under the provisions of section 6448, *Id.*, to condemn and pay for the same; and such right is not barred by the lapse of less than 21 years from the time of such occupation by the company.—*Lawrence R. Co. v. O'Harra*, Ohio, 28 N. E. Rep. 175.

44. EMINENT DOMAIN — Compensation.—Where condemnation proceedings are had under the general railroad law, the condemning company cannot tender and pay into court the amount of the award of the commissioners, and enter into possesion of the lands sought, until the owner shall have had reasonable time to take an appeal from the commissioners' report.—*Waite v. Port Reading Ry. Co.*, N. J., 22 Atl. Rep. 261.

45. EMINENT DOMAIN—Injunction.—On a petition by a railroad for an injunction to restrain a person from building a canal across land previously condemned for the railroad's use, for which damages have been assessed by a jury and paid into court, defendant cannot urge that the complainant's charter has expired, since such objection should have been taken by *certiorari*.—*Packard v. Bergen Neck Ry.*, N. J., 22 Atl. Rep. 227.

46. EQUITY JURISDICTION — Lease.—A lessee cannot maintain a bill for the construction of a mining lease as to the amount of royalty to be paid by him.—*Lake View Min. & Manuf'g Co. v. Hannon*, Ala., 9 South. Rep. 539.

47. ESTOPPEL IN PAIS.—Where, at the time of a settlement effected between a county and the agent of its bondholders, one of the largest bondholders is present, and has in his possession past-due coupons given him by the agent a few days before, but says nothing about these coupons, though the agreement was that the settlement should include all past-due coupons, and, in pursuance of the settlement, the county pays the amount agreed on, said bondholder is estopped from recovering on them.—*Combs v. Sullivan County*, Mo., 16 S. W. Rep. 916.

48. ESTOPPEL IN PAIS—Appeal bond.—Though a surety signs an appeal-bond on condition that it shall not be delivered until signed by another surety, where he delivers it to the principal, who files it in disregard of the condition, the instrument being regular on its face, and there being nothing to put either clerk or obligee on inquiry regarding it, such surety is estopped to say that the bond is not binding on him.—*Cooper v. De Mainville*, Colo., 27 Pac. Rep. 86.

49. EVIDENCE— Street Railway — Negligence. — Evidence is admissible, in defendant's behalf, that other vehicles were constantly crossing the tracks safely at the place and about the time of the accident.—*Birmingham Union Ry. Co. v. Alexander*, Ala., 9 South. Rep. 525.

50. FIRES—Negligence.—One who burns stubble on his own land to prepare it for the plow does not commit an unlawful act within the meaning of Penal Code Cal. § 384, and where due care and diligence are exercised in building the fire, and in endeavoring to control it after it has spread to adjoining land, there is no liability for

the treble damages imposed by Pol. Code Cal. § 3344, upon one who negligently sets fire to his own woods, or who negligently permits it to extend beyond his own lands.—*Garnier v. Porter*, Cal., 27 Pac. Rep. 55.

51. FRAUD—Evidence.—Fraud must be proved, and is never to be presumed; but a resort to presumptive evidence may be had to establish it. Lest, however, juries should indulge in presumptions of fraud from insufficient facts or circumstances, appropriate instructions, if requested, should be given by the court.—*Marsh v. Cramer*, Colo., 27 Pac. Rep. 169.

52. FRAUDULENT CONVEYANCES.—Under Rev. St. Tex. art. 2465, providing that "creditors, purchasers, or other persons" having legal demands may take from their debtors sufficient property to satisfy the demand, a surety on a note not due can receive from his insolvent principal sufficient property to protect him, and such transfer is valid as to other creditors of the principal.—*Frees v. Baker*, Tex., 16 S. W. Rep. 900.

53. FRAUDULENT CONVEYANCES.—Where a debtor conveyed the personal property used in his business to one of his creditors in payment of his debt, and the creditor left the debtor in possession under an agreement to conduct the business for their joint benefit, the question whether the transfer was fraudulent is one of fact.—*South Branch Lumber Co. v. Stearns*, Ind., 28 N. E. Rep. 117.

54. FRAUDULENT CONVEYANCES.—Where in an action of replevin, claimant derives title by purchase, claimed to be in good faith, from an insolvent debtor, for full value, it is proper to charge that a sale of property by a debtor, who is insolvent, with intent to defraud his creditors, of which intent the purchaser has actual notice, or information of circumstances as would lead a person of ordinary care to make inquiry, is fraudulent as to the creditors of the vendor, though the vendee may pay an adequate price; and it is not objectionable, as shifting the burden of proof.—*Wilhoyte v. Udell*, Ala., 9 South. Rep. 550.

55. GARNISHMENT—Intervention.—So far as concerns plaintiff's right to recover against the garnishee, it is immaterial whether the assignment under which the intervenor claims was upon sufficient consideration or not, where it was made by one who had acquired all defendant's interest in the fund held by the garnishee.—*Marks v. Anderson*, Colo., 27 Pac. Rep. 168.

56. HOMESTEAD.—A firm of cattle dealers, consisting of two partners who own an undivided fourth of a building used for a bank and offices, in which they use one room as an office for their book-keeper, cannot claim as their business homestead their interest in the building.—*Van Slyke v. Barrett*, Tex., 16 S. W. Rep. 902.

57. HUSBAND AND WIFE—Contract.—A contract by which a husband agrees to pay his divorced wife $45 a month for her support "for so long a time as she does not marry again" is not a restraint of marriage, nor in anywise against public policy.—*Jones v. Jones*, Colo., 27 Pac. Rep. 85.

58. INSOLVENCY—Discharge.—A judgment and order of foreclosure was rendered against the debtor after his discharge in insolvency, but before the order of discharge was entered. The debtor did not ask that the judgment be limited to the sale of the mortgaged premises: *Held*, that an action may be maintained for a balance due on the judgment after sale.—*Leisure v. Kneeland*, Wash., 27 Pac. Rep. 176.

59. INSURANCE—Limitations.—Where a policy of fire insurance provides that no action upon the policy "shall be sustained unless commenced within six months after the fire," an action cannot be brought on the policy after the lapse of six months and three days after the fire, even though the policy also provides that no action shall be begun until certain examinations have been made, which examinations were not made nor waived by the company until 13 days after the fire.—*Meesman v. State Ins. Co.*, Wash., 27 Pac. Rep. 77.

60. INTOXICATING LIQUORS—Illegal Sale.—Under Hill's Code Or. § 1913, providing that, if any person shall sell any intoxicating liquor to any minor in this State, he shall be punished by a fine of not less than $50, and shall forfeit any license he may have to sell such liquor in less quantities than one gallon, the city license of one who is convicted of selling liquor to a minor therein must be revoked, although under its charter the city has exclusive authority "to license, tax, regulate, restrain, suppress, and prohibit bar-rooms, groceries, and tippling-houses," and also power "to impose forfeitures."—*State v. Horton*, Oreg., 27 Pac. Rep. 165.

61. INTOXICATING LIQUORS—Local Option.—An information for selling liquor contrary to the local option law need not negative sales under the druggists' law, which is an exception to the general application of the local option law.—*State v. Moore*, Mo., 16 S. W. Rep. 937.

62. JUDGMENT—Vacating.—A defendant in an action to foreclose liens of material-men and mechanics, who is personally served with summons, and allows judgments to go against him by default, is not entitled nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated, on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered.—*Coffey v. Carter*, Kan., 27 Pac. Rep. 128.

63. JUSTICE OF THE PEACE—Jurisdiction.—On appeal from a justice of the peace, in an action over which he had no jurisdiction, the circuit court has no jurisdiction, nor can the circuit court acquire jurisdiction in such an action by permitting the plaintiff without the defendant's consent to so amend his complaint as to state a cause of action within the justice's jurisdiction.—*Goodwin v. Barnett*, Ind., 28 N. E. Rep. 115.

64. LANDLORD AND TENANT—Breach of Covenant.—Where a lessor prevents the lessee from enjoying the leased property in a preliminary injunction, which is afterwards dissolved, the fact that the lessee has a right of action on the injunction bond will not bar his action of covenant.—*Hubble v. Cole*, Va., 13 S. E. Rep. 441.

65. LANDLORD AND TENANT—Negligence.—One who lets offices in a building, and retains control of the halls, entries, and stairways, is bound to use reasonable care that the same are safe at all times for persons who are lawfully using the premises, and is liable to one who was injured, without negligence on her part, by reason of failure to properly light the stairway.—*Marwedel v. Cook*, Mass., 28 N. E. Rep. 140.

66. LANDLORD AND TENANT—Rent.—An action by the payee against the makers of a promissory note which states on its face that it was given for rent, is in order for judgment at the first term of the court; and in declaring upon such a note, it is not essential to the validity of the action that the declaration should expressly aver the relation of landlord and tenant, more especially where no motion to set aside the judgment was made until after the lapse of more than seven years.—*Simpson v. Earle*, Ga., 13 S. E. Rep. 446.

67. LANDLORD'S LIEN.—Under Code Ala. § 3069, which provides that the landlord of any building shall have a lien on the goods and effects belonging to the tenant for his rent, all property kept upon the premises, and used in connection with such tenancy, are subject to the lien, whether in or outside of the building.—*Stephens v. Adams*, Ala., 9 South. Rep. 529.

68. LEASE—Grant of Room in Building.—Grants of rooms or apartments in a building, like leases of the same, must be construed according to the intention of the parties, and with reference to the subject-matter upon which they operate.—*Hahn v. Baker Lodge No. 47, A. F. & A. M.*, Oreg., 27 Pac. Rep. 166.

69. LIMITATIONS—Adverse Possession.—A purchaser at an administrator's sale who fails to get a deed, and who permits the widow to remain in possession for nearly 20 years without bringing action or having dower assigned, is not guilty of laches, and may have the title decreed in himself.—*Sherwood v. Baker*, Mo., 16 S. W. Rep. 938.

70. LIMITATIONS—Adverse Possession.—Where one in actual possession of about 60 acres of a league and labor of land which has been subdivided by the original patentee, and the subdivisions sold, acquires a junior title to the entire league and labor, and pays taxes on it for a number of years, the statute of limitations does not run in his favor as to the entire tract, but only as to that part actually occupied by him.—*Turner v. Moore*, Tex., 16 S. W. Rep. 929.

71. LIMITATIONS — Trustees — Corporations. — Under Rev. St. Mo. 1889, § 2513, providing that, on the dissolution of any corporation, the president, directors, or managers shall be trustees to wind up its affairs, and sue for debts, etc., a cause of action in favor of such trustees, and against one, the secretary, holding corporate funds, arises on the dissolution of the corporation, and the statute of limitations then begins to run against the trustees' right of action.—*Landis v. Saxton*, Mo., 16 S. W. Rep. 912.

72. MALICIOUS PROSECUTION.—The malicious institution, without probable cause, of a civil suit, gives defendant a right of action for malicious prosecution, though he was neither arrested nor his goods seized.—*Smith v. Burrus*, Mo., 16 S. W. Rep. 881.

73. MANDAMUS — Official Discretion.—The office of a return to a peremptory writ of *mandamus*, by the respondent therein, is to show a compliance by him with the order of the court. This return, however, is not conclusive and the relator may controvert its truthfulness by a motion to require the respondent to show cause why he should not be attached for contempt for disobeying the order of the court in the particulars set forth in the motion.—*State v. Crites*, Ohio, 28 N. E. Rep. 178.

74. MASTER AND SERVANT — Dangerous Machinery.—When the owners of a horse-power threshing-machine are guilty of gross negligence by leaving the bevel-wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman, engaged in threshing with the machine in this condition, attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury.—*Mastin v. Levagood*, Kan., 27 Pac. Rep. 122.

75. MASTER AND SERVANT—Fellow servants. — Where the foreman of a railroad company, having exclusive control over a gang of men employed by the company, with full power to direct their movements and enforce obedience, orders an employee to work at a certain place, and, while he is there, negligently directs another to start a locomotive, whereby the employee is killed, he cannot be considered a fellow-servant so as to relieve the company from liability.—*Nall v. Louisville, N. A. & C. Ry. Co.*, Ind., 28 N. E. Rep. 183.

76. MASTER AND SERVANT — Negligence. — Where a brakeman is brushed from the side of a car by a car standing on the side track, too near the main track, and it appears that there was no defect in the construction of the tracks, and that the cars on the side track were placed there by another train crew, it is error to charge the jury that, if the brakeman was knocked from the car he was on, "wholly by the negligence and carelessness of the defendant, its agents and servants, in negligently leaving the car standing so close to the main track as to be dangerous, then plaintiff could recover," as leaving the car too close to the main track is the act of a fellow-servant for which the company is not responsible.—*Schaub v. Hannibal & St. J. R. Co.*, Mo., 16 S. W. Rep. 924.

77. MASTER AND SERVANT—Negligence — Pleading. — Where in an action for personal injury caused by a train falling through a bridge, the complaint merely alleges that defendant negligently suffered the bridge to become out of repairs, and to remain in an unsafe condition, there can be no recovery on the ground that the bridge was originally improperly constructed.—*Knahtla v. Orgeon Short Line & U. N. Ry. Co.*, Oreg., 27 Pac. Rep. 91.

78. MECHANIC'S LIEN—Fixtures.—Code Wash. 1881, ch. 138, which gives mechanics' liens on real property, has no application to work done for a tenant on his machinery and appliances used by him on the demised premises, but not so attached to the realty as to become part of it.—*Schettler v. Vendome Turkish Bath Co.*, Wash., 27 Pac. Rep. 76.

79. MORTGAGES — Assignment.—A mortgagor cannot impeach the validity of an assignment of the mortgage by his mortgagee, and in an action of ejectment by the purchaser at the mortgage sale, it is proper to exclude evidence that there was no consideration for such an assignment.—*Johnson v. Beard*, Ala., 9 South. Rep. 535.

80. MUNICIPAL CORPORATION—Extension of Boundaries.—A city of the first class has power to extend and enlarge its boundaries so as to include within it a continuous body of land lying contiguous to the prior limits of said city, when the ordinance providing for such extension is approved by the district court of the county within which said city is situate.—*Hurla v. City of Kansas City*, Kan., 27 Pac. Rep. 143.

81. MUNICIPAL CORPORATIONS — Ordinances — Street Railways.—Rev. Ord. St. Louis 1887, art. 6, § 1246, subd. 4, providing that "the conductor and driver of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles the cars shall be stopped in the shortest time and space possible," is valid, since, under the charter of the city, franchises are granted to street-railway companies on condition that they submit to all ordinances regulating them, and it is competent, therefore, for the city, in consideration of the franchise granted, to impose by ordinance the duty of exercising a high degree of care.—*Fath v. Tower Grove & L. Ry. Co.*, Mo., 16 S. W. Rep. 913.

82. MUNICIPAL CORPORATION—Public Improvements.—Under Rev. St. Mo. 1879, § 4940, giving the city councils of cities of the fourth class power to pass ordinance to lay out new streets and alleys, and to widen those already laid out, no notice need be given of the intention to pass an ordinance widening an alley, though section 4942 provides that the council "shall have the power, by ordinance, to vacate any alley, road, street," "provided that notice of the intended change of the limits of such city, or the opening, locating, vacating, or changing of any street, alley, ward, or avenue in such city, be given by publication."—*Marsh v. City of Oregon*, Mo., 16 S. W. Rep. 896.

83. MUNICIPAL CORPORATION—Public Improvements.—Under the charter of Kansas City, art. 7, § 4, providing that in condemnation proceedings the mayor may be authorized to take relinquishment of property without claims for damages, on condition of exemption from payment of benefits, it is immaterial whether the contracts of relinquishment are signed by the mayor before or after an ordinance passed by the council authorizing him to make them.—*City of Kansas v. Morse*, Mo., 16 S. W. Rep. 894.

84. NEGOTIABLE INSTRUMENT—Defenses. —Where the defendants in an action upon a promissory note admit that they signed the note, and that the note after its maturity was assigned to the plaintiff in the action by the payee of the note, and the plaintiff has the possession of the note: *Held*, that a *prima facie* case in favor of the plaintiff and against the defendants is established.—*Hoskinson v. Bagby*, Kan., 27 Pac. Rep. 110.

85. NEGOTIABLE INSTRUMENT — Payment— Nonsuit.—Where, in an action upon a note, defendant claims payment and introduces a receipt given by plaintiff, it is error to exclude evidence explaining the receipt and grant a nonsuit, under Hill Code Oreg. 246, which provides that "a judgment of nonsuit may be given against the plaintiff on motion of defendant when on the trial the plaintiff fails to prove a sufficient cause to be submitted to the jury." — *Rader v. McElvain*, Oreg., 27 Pac. Rep. 97.

86. NEGOTIABLE INSTRUMENT—Pleading.—In an action on a note, a complaint which says nothing on the subject

of failure to pay, except that "no part of the principal sum mentioned in said note still remains due and unpaid," is insufficient to sustain a judgment.—*Notman v. Green*, Cal., 27 Pac. Rep. 157.

87. OFFICE AND OFFICER—Constitutional Law.—Act Ind. 1891, entitled "An act creating the office of State supervisor of oil inspection, prescribing the duties thereof, providing for the appointment of such supervisor, abolishing the office of chief of the division of mineral oils, and State inspector of oils, repealing all laws inconsistent therewith, and declaring an emergency," is not in violation of Const. Ind. art. 4, § 19, which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."—*State v. Hyde*, Ind., 28 N. E. Rep. 186.

88. PARTITION—Sale.—Where a bill for partition fails to allege facts showing that the lands cannot be fairly divided, and there is no evidence showing that the lands cannot be equitably partitioned, a decree of sale for distribution or partition is erroneous.—*Keaton v. Terry*, Ala., 9 South. Rep. 524.

89. PARTNERSHIP ASSETS—Conveyances.—Two members composing a partnership may unite in selling the entire assets thereof in payment of debts due individually by such members, and the sale if made in good faith and without fraud, will be valid against creditors of the firm, notwithstanding the insolvency of the partnership; provided the transaction is not, as to any one of the partners, obnoxious to the statute against voluntary conveyances by insolvent debtors. If the value of one partner's share in the partnership property considerably exceeds in amount his individual debts settled by the sale, it amounts in law to a donation by him of such excess to his partner.—*Ellison v. Lucas*, Ga., 13 S. E. Rep. 445.

90. PHYSICIANS—Admission to Practice—Mandamus.—Under ordinance of board of health, as to admission of physicians to practice the board is the proper body to determine whether the certificate presented is that of a reputable college, and *mandamus* does not lie to compel it to permit a registry.—*State v. Board*, N. J., 22 Atl. Rep. 226.

91. PRINCIPAL AND AGENT — Agent's Authority.—An agent's authority to "settle and collect" a debt does not necessarily include the authority to discharge the debtor upon payment of a sum less than the entire debt, and it is error to so charge the jury.—*Scales v. Mount*, Ala., 9 South. Rep. 513.

92. PRINCIPAL AND SURETY— Subrogation.—Where a joint judgment has been rendered against two defendants, and it appears from the pleadings that one defendant was merely surety for the other for the debt sued on, but there is no finding or decision on the question of suretyship, the surety, after paying the judgment in full, may by proceedings to revive it have the question of suretyship adjudicated, and obtain execution against his co-defendant for his benefit.—*McClure v. Lucas*, Ind., 28 N. E. Rep. 153.

93. PROHIBITION—Attachment.—Where, in an action against non-residents to enforce payment of subscription to the capital stock of a corporation, an attachment was issued against land in this State belonging to defendant, a writ of prohibition will lie to restrain plaintiff from proceeding in the cause upon the ground that it is not a cause wherein an attachment would lie since there is a plain, speedy, and adequate remedy, in the ordinary course of law, by appeal.—*Agassiz v. Superior Court*, Cal., 27 Pac. Rep. 49.

94. PUBLIC LAND—Swamp Land.—Since, under the laws of California, the duties of the county treasurer in respect of swamp lands are merely to receive payment of the purchase money, whose amount and the conditions of whose payment are fixed by statute, and report the same to the register of the land office, he is not disqualified to apply for and purchase such land himself.—*Miller v. Byrd*, Cal., 27 Pac. Rep. 51.

95. RAILROAD COMPANIES—Crossing Streets.—The grant to a railroad company by its charter of power to lay out and construct a railroad between designated termini carries with it, as an incident of the grant, power to cross streets and highways within the location of its road, without any special grant to that effect.—*Allen v. Mayor*, N. J., 22 Atl. Rep. 257.

96. RAILROAD COMPANIES — Crossings.— Where, in a suit for the death of plaintiff's intestate, the evidence shows that the intestate, on hearing the approach of the train, started from his house to the depot on a run, and never stopped to observe the train, which was running 40 miles an hour, but attempted to cross the track in front of it, and was killed, there can be no recovery, since it was not the duty of the engineer to check the train when he first saw the intestate approaching the track, as he had a right to presume that the intestate would not attempt to cross in front of the train, which was in plain view, and within his hearing.—*Boyd v. Wabash Western Ry. Co.*, Mo., 16 S. W. Rep. 909.

97. RAILROAD COMPANIES — Fences. — In an action against a railroad company for injury to cattle, a complaint which alleges that the road was not fenced at the place where the cattle came on the track need not also allege that the road could properly have been fenced at that place, since inability to fence is a matter of defense.—*Louisville, etc. Ry. Co. v. Hughes*, Ind., 28 N. E. Rep. 159.

98. RAILROAD COMPANIES—Street Crossings.—Where it appears that a city requested a railroad company to put up gates at a certain crossing, and that soon afterwards such gates were put up, the jury, in an action for personal injuries at such crossing, may infer that the railroad company erected the gates because of the request, and thereby admitted that they were reasonably necessary for the public safety.—*Merrigan v. Boston, etc. R. Co.*, Mass., 28 N. E. Rep. 149.

99. RAILROAD COMPANIES—Street Railroads.—Article 10, § 6, of the charter of St. Louis provides that "any street-railroad company shall have the right to run its cars over the track of any other street-railroad company on payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance: and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect:" *Held*, that, an ordinance having been passed giving the right to use tracks, the only thing necessary to perfect the right was to have the "just compensation" ascertained, as provided by ordinance.—*Union Depot R. Co. v. Southern Ry. Co.*, Mo., 16 S. W. Rep. 920.

100. RAILROAD COMPANIES—Street Railways—Injunction.—Injunction will not lie to restrain a street railroad company from laying a second track across the track of another, where it appears that the latter company has no exclusive right to occupy the street, and the answer of the former alleges that it owns the right of way over which the other track is constructed, and it is not alleged that the former company is insolvent, or that the injury will be irreparable.—*Highland Ave. & B. Ry. Co. v. Birmingham Union Ry. Co.*, Ala., 9 South. Rep. 568.

101. REAL ESTATE AGENT — Commission. — Where a broker agrees to sell land upon condition that the owner shall first make $500 out of the sale, the broker to have the rest of the profit as his commission, he is not entitled to commission for merely finding a purchaser, where the sale to such purchaser falls through on account of a defect in the title.—*Seattle Land Co. v. Day*, Wash., 27 Pac. Rep. 74.

102. REMOVAL OF CAUSES—"Local Prejudice."—A non-resident plaintiff, suing in the State court, against whom a counter-claim is brought, becomes thereby a "defendant," within the provision of the removal act of congress (25 U. S. St. 435) that in a controversy between citizens of the State where the suit is brought and citizens of another State any defendant, being such citizen of another State, may remove the suit into the United States circuit court on the ground of prejudice and local influence, and the case is removable on his

petition.—*Walcott v. Watson*, U. S. C. C. (Nev.), 46 Fed. Rep. 529.

103. REMOVAL OF CAUSES — National Bank.—A suit against a national bank to reach property held as a part of its assets by its receiver, appointed by the comptroller of the currency, arises under the laws of the United States, and may be removed from the State court into the federal court.—*Sowles v. First Nat. Bank*, U. S. C. C. (Vt.), 46 Fed. Rep. 513.

104. REPLEVIN—Bond. — In an action on a replevin bond it appeared that the plaintiff's right to the property was derived from the levy of an execution against a third person who owned the goods, and that the defendant, who was defeated in the replevin suit, held an unsatisfied chattel mortgage on the goods for more than their value: *Held*, that only nominal damages could be recovered, since, as the levy was made after the execution of the mortgage, the mortgagor's interest, which was all that was levied on, was worthless.—*Consolidated Tank line Co. v. Bronson*, Ind., 28 N. E. Rep. 155.

105. RES ADJUDICATA—County Warrant.—An order of the county court allowing a claim against the county, and directing that a warrant issue therefor under the statutory power given to such courts, in Missouri, "to audit, adjust, and settle all accounts to which the county shall be a party," is not a judicial determination of the validity of the claim, so as to prevent want of consideration being set up as a defense in an action on the warrant.—*Sears v. Stone County*, Mo., 16 S. W. Rep. 878.

106. SALE—Warranty.—Where the seller of a soda-water apparatus, which the buyer has no opportunity to inspect before the sale, represents that it has safety-valves, when in fact it has none, the buyer, on discovering this defect after the shipment of the apparatus to him, may refuse to receive it, and recover the purchase money paid in advance.—*Packham v. Davis*, Ala. 9 South. Rep. 509.

107. SLANDER—Intention.—It is not slander *per se* to say of another that he "is going to start a house of ill fame, so sign a protest against him," since the words only charge an intention to commit the offense.—*Fanning v. Chace*, R. I., 22 Atl. Rep. 275.

108. SPECIFIC PERFORMANCE.—Where the performance of a contract depends upon the consent of a third person, and that consent is withheld, specific performance becomes an impossibility, and that remedy is not available.—*Musgrove v. Hodges*, Kan., 27 Pac. Rep. 121.

109. STATUTES — Time of Taking Effect. — Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect the day of its publication is to be included; but the precise time of its publication or taking effect may be shown, where an act is done on the same day of its publication, if the hour of publication affect such act in any way.—*Leavenworth Coal Co. v. Barber*, Kan., 27 Pac Rep. 114.

110. TAXATION.—In order to render a return made by a tax payer to the assessor of property for taxation, "a false return," within the meaning of original and amended section 2781, Rev. St., there must appear, if not a design to mislead or deceive on the part of the tax-payer, at least culpable negligence.—*Ratterman v. Ingalls*, Ohio, 28 N. E. Rep. 168.

111. TAXATION—Levy.—Under Rev. St. Ill. ch. 121, § 117, which makes it the duty of the board of supervisors to cause the amount of the arrearages of the road tax returned by the overseer of highways to be levied and collected like other taxes, it is not necessary to the validity of such a tax that the supervisors' records should show that the board ordered the levy of the tax.—*Wabash R. Co. v. People*, Ill., 28 N. E. Rep. 134.

112. TAXATION — Taxable Property. — Real estate in Savannah, held by purchase from the city, the terms of purchase being the payment of an annual ground rent forever, or, at the election of the purchaser, his heirs, executors, administrators, or assigns, the payment in full of the stipulated purchase money at any time, is taxable by the municipal government as the property of the purchaser or his successor in the title.—*Wells v. Mayor*, Ga., 13 S. E. Rep. 442.

113. TELEGRAPH COMPANIES — Negligence. — A telegraph company cannot relieve itself from liability for mistakes or delay in the transmission of messages, caused by the negligence of its employees, by a condition on its blanks that it will not be so liable unless the message is repeated.—*Wertz v. Western Union Tel. Co.*, Utah, 27 Pac. Rep. 173.

114. TOWNS — Defective Highways. — In an action against a town for injuries caused by an alleged defect in a highway, consisting in the absence of a railing, it is proper to instruct the jury that a town is not obliged to fence its highways so as to keep travelers from straying from the road, and that their liability to get out of the road does not constitute a defect, but that a town is obliged to put up barriers where they are necessary to make the highway reasonably safe.—*Hudson v. Inhabitants*, Mass., 28 N. E. Rep. 147.

115. TRESPASS TO TRY TITLE—Community Property.—Where, in trespass to try title, plaintiffs claim by virtue of a levy and sale under an execution against defendant, and defendant claims that the land was the separate estate of his wife, but the deeds show that they were made to the wife after the marriage, and do not declare the property to be her separate estate, plaintiffs have made out a *prima facie* case, as it will be presumed that the property was community property.—*King v. Holden*, Tex., 16 S. W. Rep. 898.

116. TRIAL—Witness.—The Indiana Code provides that witnesses residing in the county where the court is held may be required to attend without prepayment of their fees; that a witness from another county is entitled to prepayment of fees and mileage; and that, where a witness does not reside in the county where the court is held, or in an adjoining county, his deposition may be taken: *Held*, that a witness cannot be compelled to attend court in a civil case in any other county than that in which he lives, or in an adjoining county.—*Alexander v. Harrison*, Ind., 28 N. E. Rep. 119.

117. VENDOR AND VENDEE — Warranties. —In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, *i. e.*, until the deed is given.—*Durham v. Hadley*, Kan., 27 Pac. Rep. 105.

118. WARRANTY—Damages.—In an action for damages for a breach of warranty concerning the quality of certain paint, probable or future damages, which are not certain, fixed, or liquidated, cannot be allowed.—*F. Hammer Paint Co. v. Glover*, Kan., 27 Pac. Rep. 130.

119. WILLS—Construction.—A devise to a town for the benefit of its inhabitants, which directs that the income of the fund so created "shall forever be applied under the direction of the town to the support of public schools in said town, and to purchasing school books for the public schools, unless it shall appear to the town that it can be applied in some more profitable and beneficial way," does not authorize the town to purchase books, and present them to individual scholars who attend its public schools from year to year.—*Davis v. Inhabitants*, Mass., 28 N. E. Rep. 165.

120. WILLS—Construction.—A will contained a residuary clause, providing that "I give, bequeath, and devise to my nephews," naming six of them, "all the rest of my estate, share and share alike, they paying out of the same all my just debts, funeral charges, and the expenses of settling my estate:" *Held*, that the nephews took as a class, and not as individuals, and, where one of them died before the testator, his legacy fell into the residue.—*Chase v. Peckham*, R. I., 22 Atl. Rep. 285.